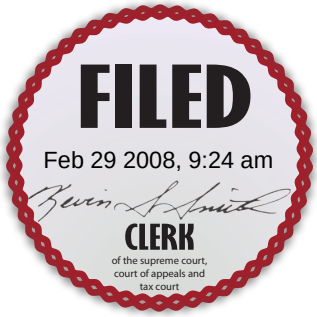

ATTORNEY FOR APPELLANT:

ALISON T. FRAZIER
Dupont, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL JORDAN, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A04-0709-CR-496
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable G. Michael Witte, Judge
Cause No. 15D01-0601-FD-1

February 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Michael Jordan, Jr., appeals the revocation of his probation and reinstatement of his two-year suspended sentence. We affirm.

Issues

Jordan raises two issues on appeal, which we restate as:

I. whether there was sufficient evidence to support the trial court's conclusion that Jordan violated probation; and

II. whether the trial court properly reinstated the entire two years of his remaining sentence.

Facts

Jordan pled guilty to Class D felony residential entry on March 10, 2006. He was sentenced to three years, with two suspended on probation. That conviction stemmed from a January 1, 2006 incident between Jordan and his girlfriend D.H. The couple has three children together. At that time, D.H. had a protective order against Jordan. She arrived home to find his vehicle in her driveway and called police. Officers found Jordan asleep inside the residence. Neighbors had witnessed a man kicking in the front door of the home earlier that day.

Jordan was on probation for that offense when on April 26, 2007, he again came to D.H.'s home, pounded on the back door, and screamed. D.H. was in a back bedroom when the yelling started. Before she could gather them into the bedroom, her four children were near the kitchen and addressed the person at the door as "daddy." Tr. p.

29. She recognized Jordan's voice, but did not see him. Jordan was yelling, "I'm going to beat your brains in." Tr. p. 19. One of the children told D.H. he saw a van pull into the driveway. The oldest child called 911. The yelling and pounding continued for ten minutes, until D.H. saw the taillights of a vehicle driving away.

Officer Brian Jansen responded to the 911 call, and passed a dark colored minivan on his way to D.H.'s house. He suspected this might be the vehicle that was spotted leaving the house, but was unable to follow it. He obtained Jordan's address from dispatch and went to that residence. Jordan was talking on his cell phone outside of the home and smelled of alcohol. Jordan told Officer Jansen he was not at D.H.'s house and he had been talking on his cell phone for at least thirty minutes. He admitted to driving the van just before Officer Jansen's arrival, but said he had gone to get something to eat. Officer Jansen testified that the hood of the van was "slightly warm" to his touch. Tr. p. 38. Officer Jansen talked to D.H. and two of her children later that night. The ten-year-old and the five-year-old child told Officer Jansen they saw Jordan at the back door.

On April 27, 2007, the State filed a charge of Class B misdemeanor invasion of privacy against Jordan. Jordan had two prior convictions for invasion of privacy and both involved D.H. The trial court conducted a probation violation hearing on June 4 and June 18, 2007. The trial court found that he violated probation, revoked the 730 remaining days of his probation, and reinstated the sentence.

Analysis

I. Sufficiency of the Evidence

Jordan argues that the State presented insufficient evidence to support the trial court's finding that he violated probation. As with other sufficiency questions, we neither reweigh the evidence nor judge the credibility of witnesses. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). When the alleged probation violation is the commission of a new crime, the State does not need to show that the probationer was convicted of that crime. Id. An alleged violation of probation only has to be proven by a preponderance of the evidence, because a probation revocation hearing is a quasi-civil proceeding. Id.

Jordan argues the trial court improperly considered hearsay testimony of Officer Jansen. Officer Jansen testified that two of the children saw Jordan at the door. Jordan did not object to Officer Jansen's testimony, and he contends on appeal that the admission of this testimony rises to the level of fundamental error. The failure to object to an error in a proceeding constitutes a waiver of appellate review "unless an error is so fundamental that it denied the accused a fair trial." Absher v. State, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007).

The admission of the hearsay testimony does not rise to the level of fundamental error. "[P]robationers do not receive the same constitutional rights that defendants receive at trial." Reyes v. State, 868 N.E.2d 438, 440 (Ind. 2007). In Reyes, our supreme court adopted the substantial trustworthiness test for admitting hearsay instead of a balancing test that required the State to show good cause for the absence of a witness. Id.

at 441. "[T]he need for flexibility combined with the potentially onerous consequences of mandating a balancing inquiry for every piece of hearsay evidence in every probation revocation hearing in Indiana weighs strongly in favor of the substantial trustworthiness test over a balancing test." Id. (citing Reyes v. State, 853 N.E.2d 1278, 1286 (Ind. Ct. App. 2006) (Barnes, J., concurring in result)). This test "requires that the trial court evaluate the reliability of hearsay evidence." Id. at 442. The trial court here acknowledged the hearsay and evaluated its reliability, stating:

> We have the two children . . . telling the officer in his investigation that they saw daddy outside the door. The Court would find it credible that the children would be able to identify their own father. Now, that is hearsay testimony that's before the Court. We didn't have these children on the stand testifying. Of course, the Court understands that probably it's not prudent to put young children on the witness stand to be witnesses against their own father but the officer interviewed them and the Court takes that for what it's worth.

Tr. pp. 82-83.

The trial court proposed valid reasons why the testimony was reliable enough to forego putting the children on the stand. Their mother testified the children were in that area of the house when the pounding on the back door began, the children were saying "daddy," and the ten-year-old called 911. Tr. p. 29. The children spoke with a police officer about the incident that same night. They witnessed the incident and had no reason to misrepresent what happened to them.[1] We conclude that the trial court's analysis of

[1] Jordan contends the trial court's analysis should not be considered because it mistook the ten-year old child as one of Jordan's biological children, when Jordan is not actually that child's father. Jordan implies that the paternity of the child would give him reason to be dishonest. We find the paternity of that

the testimony was sufficient to establish it had substantial trustworthiness. In addition, we should point out that the trial court did not rely solely on the hearsay testimony. D.H. testified that although she did not see him at the back door, she recognized Jordan's voice. The trial court also observed and remarked on several discrepancies in the testimony of two of Jordan's alibi witnesses. The trial court had sufficient evidence to conclude that Jordan violated his probation.

II. Sentence

Jordan also argues that the trial court erred by reinstating the remaining two years of his suspended sentence. We review a trial court's sentencing decision in a probation revocation proceeding for an abuse of discretion. Abernathy v. State, 852 N.E.2d 1016, 1020 (Ind. Ct. App. 2006). "A defendant may not collaterally attack a sentence on appeal from a probation revocation." Jones v. State, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005). Serving a sentence in a probation program is not a right, but rather a "matter of grace" and a "conditional liberty that is a favor." Id.

As long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Indiana Code Section 35-38-2-3, the trial court may order execution of a suspended sentence upon a finding of any violation by a preponderance of the evidence. Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999). Specifically, Indiana Code Section 35-38-2-3(g) provides:

---

child to be irrelevant. In any event, the trial court specifically acknowledged the oldest child was not Jordan's. See Tr. p. 29.

> If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may:
>
> (1) continue the person on probation, with or without modifying or enlarging the conditions;
>
> (2) extend the person's probationary period for not more than one (1) year beyond the original probationary period; or
>
> (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Because we have determined that the trial court properly found Jordan violated probation, it was within the trial court's discretion to determine and impose a sanction under Indiana Code Section 35-38-2-3(g). See Abernathy, 852 N.E.2d at 1022. The trial court ordered execution of the entire remaining suspended sentence in line with Indiana Code Section 35-38-2-3(g)(3). Jordan contends that the nature of his crime and his character do not warrant the imposition of nearly two years of incarceration. Jordan's sentence, however, cannot be collaterally attacked on appeal as inappropriate. It was within the trial court's discretion to reinstate the entire sentence and we affirm that decision.

Conclusion

Sufficient evidence existed to support the trial court's finding that Jordan violated probation. The trial court did not abuse its discretion in revoking Jordan's probation and reinstating the remainder of his sentence. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.